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In The

Supreme Court of the United States

October Term, 1977

No. 77-358

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

vs.

COMMERCE TANKERS CORPORATION,

and

VANTAGE STEAMSHIP CORP.

Respondents.

BRIEF IN OPPOSITION OF COMMERCE TANKERS CORPORATION

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TABLE OF CONTENTS

Page

Question Presented 1

Statutes Involved 2

Statement of the Case 4

Argument:

I. The NMU has omitted to state certain undenied critical facts relevant to the issues presented for review. 5

II. Extension of the Noerr-Pennington Doctrine to exculpate the NMU's conduct in this case is not justified by prior precedents and would create an inappropriate loophole in the administration of the antitrust laws. 9

III. Congress clearly intended that labor unions bear the financial burden arising from the imposition of secondary boycotts. 13

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Adolph Coors Co. v. A & S Wholesalers, Inc., 1977-2 CCH Trade Cases ¶61, 505 (10th Cir. 1977) 12

Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945) 13, 15

Contents

Page

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 11

Connell Construction Company, Inc. v. Plumbers and Steamfitters Local No. 100, 421 U.S. 616 (1975) 4, 15

Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) . 13

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 9

Giboney v. Empire Storage Co., 336 U.S. 490 (1949) 11

Howard Johnson Co. Inc. v. Hotel & Restaurant Employees, 417 U.S. 249 (1974) 6

National Maritime Union of America, AFL-CIO and Seafarers International Union of North America-Atlantic, Gulf, Lakes and Inland Water District, AFL-CIO and Mathiasen's Tanker Industries, Inc., Case No. 2-CE-90, N.L.R.B., Region 2 (1976) 12

National Maritime Union (Overseas Carriers Corp.), 174 N.L.R.B. 216 (1969) 6

National Woodwork Mfgrs. Association v. NLRB, 386 U.S. 612 (1967) 14, 15

Moore-McCormack Lines, Inc., 139 N.L.R.B. 796 (1962) 6

United Mine Workers v. Pennington, 381 U.S. 657 (1965) .. 10

United States v. Hutcheson, 312 U.S. 219 (1941) 13

Contents

Page

Statutes Cited:

Clayton Act, §4 (15 U.S.C. §15) 2

Labor Management Relations Act, §8(e) 29 U.S.C.:

§158(b)(4)(A) 14

§158(b)(4)(B) 14

§158(e) 2, 8

§§301-303 .....14, 15

National Labor Relations Act:

§8(b)(4) 14

§8(e) 14

Sherman Act, §1 (15 U.S.C. §1) 2

1947 U.S. Code Cong. Service 1135, 1149-50 14

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BRIEF IN OPPOSITION

Commerce Tankers Corporation ("Commerce") submits this brief in opposition to the petition by the National Maritime Union of America, AFL-CIO ("NMU") that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in this case on April 15, 1977.

QUESTION PRESENTED

Whether a labor union's agreement with other unions and certain employer parties to engage in an industry-wide secondary

boycott, found to be violative of the labor laws and apparently violative of the antitrust laws, should be exempt from liability solely because during the pendency of their challenge to the unlawful arrangement the suing parties were compelled by an erroneous order of preliminary injunction to comply with the void agreement?

STATUTES INVOLVED

Sherman Act, §1 (15 U.S.C. §1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; . . . ."

Clayton Act, §4 (15 U.S.C. §15):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Labor Management Relations Act, §8(e) (29 U.S.C. §158(e))

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using,

> selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforciable and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

STATEMENT OF THE CASE

In the proceedings below, Commerce and Vantage Steamship Corp. ("Vantage") asserted labor law, antitrust, wrongful injunction, and torious interference claims against the NMU for the Union's admitted frustration of Commerce's attempt to sell a United States flag ocean-going tanker to Vantage.

The District Court dismissed all of the claims except for the wrongful injunction claim, as to which the District Court limited Commerce's relief to $10,000, the amount of the injunction bond which had been posted by the NMU. The Court of Appeals affirmed in part and reversed and remanded for further proceedings in respect to one of the antitrust claims.

To the extent that the Court of Appeals has upheld the injunction bond as a limit on their recovery for the wrongful injunction, Commerce and Vantage have petitioned this Court to grant certiorari to review the validity of that judge-made rule and the constitutionality of the application thereof under the unique facts of this case[1] (Case No. 77-376). On the other hand, the NMU asserts that the Court of Appeals erred by not extending the injunction bond limitation rule to preclude the antitrust claim asserting, in substance, that resort to court is constitutionally protected activity which may not be violative of the Sherman Act. Commerce agrees that agreements limited to urging the executive, administrative, legislative, or judicial branches of Government to take action with anticompetive consequences, are exempt from antitrust liability, but intends to demonstrate herein that no such agreement is even involved in this case. It is the position of Commerce that the NMU petition has omitted certain critical facts relevant to the issues presented

1. Certiorari was also sought on the grounds that the Court of Appeals' instructions on remand clearly diverge from this Court's recent holding in *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1975).

for review, has misconstrued the authorities relating to the *Noerr-Pennington* doctrine and has neglected to deal with the clear congressional intent that labor unions bear the financial burdens arising from the imposition of secondary boycotts.

ARGUMENT

I.

The NMU has omitted to state certain undenied critical facts relevant to the issues presented for review.

The Union's petition plaintively asserts that the NMU is being exposed to massive potential treble damage liability "solely because of [its] successful resort to arbitration and litigation" (Pet., p. 11), and in its statement of the case the Union revives the implication that Commerce and Vantage were trying to evade NMU jurisdiction and got caught in the act by a diligent union seeking merely to preserve its ostensibly lawful rights.[2] There is not an iota of testimony or other evidence in the record to support that implication which is the underpinning on which the "resort to court" argument relies.

The key facts omitted are the following:

1. There was a long history in the maritime industry of jurisdictional conflicts among the various unions, including particularly the competing seamen's unions. To assure free transferability of United States flag vessels, the National Labor Relations Board ("NLRB") adopted a unique rule of labor relations which required each employer to use a crew of seamen

2. On the Union's application for a preliminary injunction, District Judge Frankel, acting in haste on the Union's untimely filed and unanswered motion papers, and without the benefit of an evidentiary hearing, drew certain "inferences" to that effect. 325 F. Supp. 360 (S.D.N.Y. 1971). After a full trial, District Judge Griesa adopted none of those inferences. 411 F. Supp. 1224 (S.D.N.Y. 1976), reproduced in the petition as Exhibit D, 29a-65a.

represented by a single union on its entire fleet of vessels, including newly acquired vessels. See *Moore-McCormack Lines, Inc.*, 139 N.L.R.B. 796 (1962); *National Maritime Union (Overseas Carriers Corp.)*, 174 N.L.R.B. 216 (1969).

2. During 1968 and early 1969, the NMU and certain other maritime unions reached an agreement among themselves to demand of participating employers two major changes from their previous agreements. One was industry-wide pension funding, and the second was the clause which obligated contracted employers not to sell their vessels to competitors eligible to compete in the coastwise trade otherwise than to companies committing to retain the same unions on all the same terms and conditions,[3] including industry-wide pension funding. (Of course, in light of the fleetwide rule, the only buyers who could lawfully commit to retain the NMU were those who did not have a conflicting agreement with another union.)

3. In late 1969, the NMU arrived at an oral agreement with a Mr. Edward Silver, representing two employer associations, to include the restraint-on-transfer agreement in the 1969 agreements, the economic terms of which had earlier been approved by the individual employers, including Commerce. Neither Commerce nor any other independent employer was apprised that such a clause had been, or would be, demanded. Neither Commerce nor any other independent was asked to sign,

3. Both prior to 1969 and thereafter, the NMU, in accordance with the fleetwide principle, required its contracted parties to extend NMU jurisdiction to newly acquired vessels. The NMU's one-sided position was: if you buy, we get jurisdiction; and if you sell, we keep jurisdiction (and get jurisdiction over the buyer's other vessels). Thus, contrary to the NMU's petition (which totally *omits* mention of the fleetwide rule), restraint-on-transfer was not "a form of successorship obligation common in American labor relations" (Pet. 9, fn. 6), nor was the situation similar to that in *Howard Johnson Co. Inc. v. Hotel & Restaurant Employees*, 417 U.S. 249 (1974) for the simple reason that Vantage could not, even if it so desired, lawfully give the NMU undertaking without violating its collective bargaining arrangements with a competing union.

or otherwise acquiesce to, the provision.[4] Instead, without any explanation, or covering letter, the NMU simply included the provision in its printed contract first distributed in February 1970.

4. On December 23, 1970, Commerce — for pressing economic reasons[5] — contracted to sell its remaining vessel to Vantage, with delivery scheduled for after February 28, 1971.

5. There is not even any allegation that in making the sale Commerce was motivated by anti-union or anti-NMU animus. Indeed, it is clear that with respect to "union continuation" the steamship companies had a drastic misunderstanding that arose from a "brief mention" of the clause "in the midst of discussing various matters" the night before the contract was signed (Pet. 50a).[6] Commerce promptly publicly announced the transaction

4. Despite the documentary evidence (Record, E68) that the industry consent to restraint-on-transfer was a "condition" of the negotiations, Judge Griesa found that the omission to present this clause to individual employers was "due to oversight by NMU personnel," a finding which Commerce contends is grossly erroneous and which defies belief in light of the trial transcript. Compare Record 415a *et seq.* with 979a-981a.

5. Commerce was and is a subsidiary of Vernitron Corporation. In 1970, Vernitron suffered financial losses in excess of $14 million. The sale of the ships was only part of a complex corporate reorganization hurriedly consummated at that time to save the entire company.

6. The NMU petition falsely states that Commerce "made every effort to transfer the Vessel before the Court could act . . ." (Pet. 8). The uncontradicted evidence showed that on February 4, 1971, Commerce first appreciated the jurisdictional problem inherent in the sale and immediately offered to cancel, but Vantage rejected cancellation. The next day, Commerce requested the NMU to waive the clause, and it refused. Thus, on February 6th *(before* the arbitration), Commerce wired Vantage demanding it provide the NMU undertaking (Record, E66). And, on February 10th, Commerce commenced an arbitration between the two steamship companies which Commerce *won* (Pet. 35a) principally on the theory that Vantage's admitted promise "to take care of" the Union, and unconditional commitment to purchase the Vessel, obligated it under the facts that developed to deal with the NMU until the jurisdictional issues could be finally resolved.

more than two months before the anticipated closing date and the NMU learned of it not from any secret source, but from the publicity arising from Commerce's *public* announcement (Pet. 51a).

6. As early as January 7, 1977, the NMU knew that Vantage, "an SIU company," had contracted to purchase the BARBARA and the NMU commenced "to take steps" to stop the transaction. *Id.*

7. The NMU took all the steps it needed to take. It got the industry-wide arbitrator which it and Ed Silver had appointed to require Commerce to comply with the illegal secondary boycott "agreement" later proven to be *void* under §8(e), 29 U.S.C. §158(e). The so-called arbitration was an informal, no-witness, no-testimony, no-transcript "proceeding," at which the arbitrator pointedly refused to hear arguments addressed to the illegality of the clause, and also refused to grant Commerce's request for a 72-hour adjournment to present witnesses and brief the issues in dispute. In short, the NMU did not "go to court" to litigate anything. Only the NMU and Mr. Silver negotiated the restraint-on-transfer agreement. As far as the rest of the industry was concerned, it was simply imposed on them. The so-called arbitration was merely a tool to enforce the illegal understandings on an industry-wide basis.[7]

8. In proceedings before District Judge Inzer B. Wyatt, Vantage agreed to abide by any determination of jurisdiction that might ultimately be made by the NLRB (Record E 20-21). This was *not* enough for the NMU. They needed to "get" more than a lawful test of jurisdictional rights before the tribunal entrusted by Congress with the job of settling such conflicts. They needed and, unfortunately, obtained enforcement *pendente lite* of the illegal clause. Now that the illegality has been proven,

7. No personal rebuke to the arbitrator is intended. As Referee Kheel himself acknowledged, his contractually limited function was "to enforce" the agreement and questions of its illegality were beyond his scope.

the NMU says don't blame me; blame the judge or blame Commerce for ignoring a *void* agreement it had not signed or otherwise been alerted to, or for not seeking prompt appellate relief.[8] All of these arguments are based upon half-baked factual presentations which are not worthy of review by this Court.

II.

Extension of the Noerr-Pennington Doctrine to exculpate the NMU's conduct in this case is not justified by prior precedents and would create an inappropriate loophole in the administration of the antitrust laws.

The decision below does not conflict with the *Noerr-Pennington* doctrine.

This Court's holding in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), stands for the proposition that no violation of the Sherman Act can be predicated upon an agreement to join together to persuade the legislature or the executive branch to take particular action, even when the motive of the parties was anticompetitive. The only agreement the *Noerr* defendants were alleged to have made was an agreement to engage in a joint publicity campaign, albeit one with an anticompetitive purpose.

This Court wrote:

> "We think it equally clear that the Sherman Act does not prohibit two or more persons from

8. As the NMU well knows, in granting the erroneous order of preliminary injunction, Judge Frankel conceded that the NLRB had exclusive jurisdiction over the controversy. From the day the injunction issued, Commerce urgently and continuously pressed the agency with exclusive jurisdiction to commence unfair labor practice proceedings; and when the NLRB did so, immediately moved before the District Court and then the Court of Appeals for relief from the injunction. The Court of Appeals found that the "appellants followed a sensible course." (Pet. 15A).

associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination[s] . . . in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." 365 U.S. at 136.

In short, *Noerr* says that there is no "violation" of the Sherman Act when the combination is limited to seeking governmental intervention.[9]

The NMU would have this Court expand *Noerr* to say that even when there was a *per se* violation (such as the group boycott in this case), a party should be immunized from damages if the illegality was "ambiguous" and the enforcement thereof was aided by erroneous judicial intervention obtained by the violator.

That argument contravenes well settled principles. First Amendment rights are not immunized from regulation when

9. *Noerr* was properly applied in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) insofar as this Court exempted from the Sherman Act a combination limited to making certain applications to the Secretary of Labor. Whatever the purpose of those applications, there was no self-effectuating action and no "agreement" other than the agreement to petition the Government.

they are used as an integral part of conduct which violates a valid statute. See *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949), which enjoined picketing to enforce an unlawful secondary boycott. See also *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

Moreover, the NMU confuses the method of enforcement which it used against Commerce and that which it used to disrupt the rest of the maritime industry. No judge ordered the unions and/or the associations to make their unlawful arrangements. While the NMU was collecting up to $44 million per annum from employers whose only choice was to participate in industry wide pension funding or transfer their vessels foreign, many, many United States flag vessels were being scrapped or sold foreign.[10] The Maritime Administration, in its brief to the Second Circuit at an earlier stage of this litigation, referred to the cycle of United States vessels going foreign flag, resulting in increased contributions by the remaining owners, in turn driving "smaller companies out of business or forc[ing] them to foreign registry." (Mar. Ad. Brief, pp. 17-26, part of the record in 457 F.2d 1127 (1972)). In fact, the evidence showed that of 364 vessels under contract with the NMU as of June 1, 1969, 51 were sold foreign and an additional 135 were scrapped in the four years[11] following the adoption of the pension pooling and restraint-on-transfer agreements.

10. See Record E69 to E84. Judge Griesa found that "there was no evidence . . . the restraint clause was intended to encourage sales to foreign companies" (Pet. 49a), a finding which defies the axiom that parties intend the natural consequences of their acts and ignores the *acts* and admission of the NMU President that in enforcing the clause in this case he recognized that transfer of the vessels to foreign flag was preferable because "it is no longer able to compete in coastwise trade" whereas if it remained American flag "it could be and would be in competition with existing NMU companies and vessels that were still struggling." (E117).

11. Although the Court of Appeals had already found "reasonable cause" to believe that the clause was an 8(e) violation, it was continued in the NMU's 1972 agreements, and although determinatively found to have been unlawful in

(Cont'd)

Who is to hold the NMU responsible for this destruction of the independent American flag fleet?[12] Employers who voluntarily participated in the scheme? Employers who are still in the industry and thus dependent on continuing collective bargaining arrangements with the unions?

The short answer to the NMU's petition is that there is no constitutional right to enter into price fixing, secondary boycott, or market division agreements,[13] or to enforce such arrangements until a court voids them. Such an expansion of *Noerr* would be an open announcement to the forces of concentration that there is a new "freeway" to the imposition of unlawful restraints and a setback to the application of the antitrust laws of potentially momentous proportions.[14]

(Cont'd)
1974, the clause was continued in the NMU's 1975 agreements until the NLRB commenced a new action. *National Maritime Union of America, AFL-CIO and Seafarers International Union of North America-Atlantic, Gulf, Lakes and Inland Water District, AFL-CIO and Mathiasen's Tanker Industries, Inc.*, Case No. 2-CE-90, N.L.R.B., Region 2 (1976).

12. It is not without some irony that the very same unions which sponsored the unlawful restraint-on-transfer agreements are now urging Congress to adopt special legislation (proposed S. 61 and H.R. 1037) for their economic advantage precisely because the independent fleet has been destroyed.

13. While it is possible to distinguish the 10th Circuit's holding in *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 1977-2 CCH Trade Cases ¶ 61,505 (10th Cir. 1977) (the restraint in this case was unlawful; the restraint in *Coors* apparently lawful under recently revised law), the distinction is of little moment to the policy question: should restrictive agreements arguably violative of the Sherman Act be strictly enforceable at the behest of the party urging the restraint without treble damage risk to that party?

14. Perhaps only a labor union is positioned to assert that its abstention from strikes, picketing, threats, or violence to enforce an antitrust violation excuses the violation, but the number of fact patterns in which this situation might recur is virtually limitless. *E.g.*, is a patent monopoly later found to have been obtained by "fraud" not an antitrust violation when the "infringer" was forced out of business by the patentee's obtaining judicial relief subsequently reversed? Or is it only not a violation when the issue was "close" or "difficult to decide?"

III.

Congress clearly intended that labor unions bear the financial burden arising from the imposition of secondary boycotts.

In most respects, the basic purposes of the antitrust and labor laws are antagonistic. Federal antitrust laws are designed to prevent concerted action intended to exert control over the market place, while the labor laws are intended to allow and even encourage employees and employee organizations to take concerted action which involves a degree of control over the market place.

These objectives clash when a labor union places pressures on one employer or employer group to cause it to cease doing business with a third party, unless the latter conforms its behavior in some manner sought by the labor union. As a consequence, "secondary pressures" have been the subject of controversy, litigation, and legislation almost since the birth of the labor union movement in the United States, and have alternatively been condemned or tolerated depending on the temper of the times, the exact methods utilized, and the precise objectives of the labor organization.

Prior to congressional enactment of the Norris-LaGuardia Act, "antitrust" or "restraint-of-trade" principles were utilized to bar all secondary activities. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). In the period from enactment of Norris-LaGuardia to passage of the Labor Management Relations Act ("LMRA") traditional secondary pressures were generally free from proscription, see *United States v. Hutcheson*, 312 U.S. 219 (1941), except where management was a voluntary partner in arrangements violative of the antitrust laws. *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945).

In 1947, Congress passed the LMRA amending the

National Labor Relations Act to curb widely perceived labor abuses. One of the specific provisions Congress enacted declared unlawful strikes or boycotts, or attempts to induce or encourage such acts, where the purpose thereof was to force one employer, *inter alia*, to cease doing business with any other person. 29 U.S.C. §158(b)(4)(A) which, as subsequently amended, is now §158(b)(4)(B). See 1947 U.S. Code Cong. Service 1135, 1149-50. At the same time, Sections 301 through 303 of the LMRA were adopted to allow for suits against labor unions for breach of their collective bargaining agreements generally and for "strikes or concerted refusals to handle or work" where the object thereof was any of the practices proscribed in Section 8(b)(4).

Numerous loopholes in the application of Section 8(b)(4) developed, see *NLRB v. Servette, Inc.*, 377 U.S. 46, 51-54 (1964), most prominently the defense that "voluntary" observance by an employer of a "secondary boycott" was not unlawful. *Local 1976 United Brotherhood of Carpenters v. NLRB* (Sand Door), 357 U.S. 93 (1957). Congress promptly responded to the *Sand Door* decision by amending Section 8 to add a new subsection (e) thereto which made it illegal for any labor organization and any employer to enter or enforce any contract or agreement, express or implied, whereby the employer ceases or agrees to cease doing business with any other person and at the same time restructured Section 8 (b)(4) of the NLRA so that the list of prohibited acts by a labor union included threats, coercion, or restraint of any person where an object thereof is forcing or requiring any employer to enter into an agreement prohibited by Section 8(e). Section 303 of the LMRA was simultaneously amended to broaden the acts for which there was a civil remedy to include any activity or conduct defined as unfair labor practice in Section 8(b)(4).[15] This history is saliently reviewed in both the opinion of the Court and the dissenting opinion of Mr. Justice Stewart in *National Woodwork Mfgrs.*

15. In the District Court and in the Court of Appeals, Commerce unsuccessfully sought relief under Section 303 on the grounds that it had been "forced" to accept the agreement, and "restrained" to enforce it.

Association v. NLRB, 386 U.S. 612 (1967) which carved out a "work preservation" exception to the law on secondary boycotts.

The legislative history demonstrates that Congress intended to create a clear pattern where labor unions would be subject to financial penalties whenever they engaged in unlawful secondary boycotts. If the agreement to boycott, or the boycott itself was "forced" upon the employer, liability would be predicated on Section 303; and if the boycott was voluntarily agreed to by participating employers, then liability could be predicated on the antitrust laws as it had in *Allen Bradley, Connell Construction Company, Inc. v. Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1975). See particularly the dissenting opinion of Mr. Justice Stewart, 421 U.S. at 641 *et seq.* and 649, fn. 9.

What the NMU proposes to achieve by its "resort to court" argument in this case is to establish a whole new scheme for secondary boycotts. A scheme by which, in the absence of strikes or express threats to strike, unions and their appointed arbitrators would essentially be free to disrupt trade between employers for the purpose of *enforcing* illegal boycotts whether voluntarily arrived at or consented to in ignorance.[16] This interpretation of the law would mean that secondary boycotts are not "unenforciable and void" as Congress prescribed, but only "voidable" and not subject to redress for damages caused until voided. If upheld, such a view would violate clear congressional intent and would turn the clock back to pre-*Sand Door*.

And, more directly to the issue of whether certiorari should be granted, we would urge that the Union's utter failure to

16. In the *Sand Door* case, Justice Frankfurter sagaciously recognized that an employer's "freedom of choice" as to whether or not to engage in a boycott must as "a matter of federal policy" be available at the time "a concrete situation" arises and not merely "at the time a collective bargaining agreement is drawn up covering a multitude of subjects often in a general and abstract manner." 357 U.S. at 105-06.

acknowledge that its restraint-on-transfer agreement was found to be an unlawful secondary boycott or to deal with the legislative history concerning such boycotts render the petition fatally defective.

CONCLUSION

For the reasons stated, the NMU's petition for a writ of certiorari should be denied or, alternatively, in the event such petition is granted, it is respectfully prayed that the respondent's cross-petition (Case No. 77-376) also be granted.

Respectfully submitted,

s/ D. David Cohen
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